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No. 99-683

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, Deceased,
Petitioner,

v.

ALUSUISSE FLEXIBLE PACKAGING,
INC., DAVID ELLISON,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT ELLISON BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should waste judicial resources by reviewing the decision of the Sixth Circuit Court of Appeals, where the law of the Commonwealth of Kentucky and the facts of this case compelled summary judgment in favor of the Respondent Ellison?

II. Whether the Respondent Ellison should be prevented from having access to the Federal Courts where he was not served with process for 18 months and had nothing to do with any procedural missteps by the other Respondent.

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The Order of the United States District Court for the Eastern District of Kentucky at Frankfort, entered October 11, 1994, is not reported and is set forth in the Appendix to this Brief at page 1a.

The Order of the United States District Court for the Eastern District of Kentucky at Frankfort, entered March 21, 1995, is not reported and is set forth in the Appendix to this Brief at page 3a.

STATUTORY PROVISIONS

KRS 342.690 EXCLUSIVENESS OF LIABILITY

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other

benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

KRS 446.080LIBERAL CONSTRUCTION; STATUTES NOT RETROACTIVE; COMMON USAGE; TECHNICAL TERMS

* * *

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

STATEMENT OF THE CASE

Under Kentucky Workers' Compensation laws an employer is generally exempt from civil claims by an employee for injury in the workplace; co-employees, such as the Respondent, David Ellison ("Ellison"), also enjoy an exemption from liability. Only two exceptions are carved out of those exemptions. The first exception is found in KRS 342.610 (4), which will be found at page 97a of the Appendix

to the Petition. That statute provides that a civil cause of action will lie against the employer if injury or death results to an employee through the deliberate intention of his employer to produce such injury or death. No cause of action was stated against Ellison under KRS 342.610 (4) because that statute does not grant a cause of action against a fellow employee such as Ellison. The second exception is found in KRS 342.690 (1), which will be found at page 1a of the Appendix to this Brief. That statute provides that the employer's exemption also extends to co-employees, so long as the injury or death suffered by an employee is not caused by the wilful and unprovoked physical aggression of the co-employee. The Complaint never stated a cause of action under KRS 342.690 (1) because there was no allegation that Brierly's injury or death was caused by the "wilful and unprovoked physical aggression" of Ellison.

Ellison was the Safety Director at the facility of the Respondent, Alusuisse Flexible Packaging, Inc. ("Alusuisse") He was advised that welding was to be done on a machine known as a parts washer, which used solvents to clean ink off parts. He went to the parts washer room and observed that:

> (1) the electricity to the machine was locked out and tagged out; (2) the washing machine and solvent supply reservoir were drained of solvent; (3) the pit below the washer was ventilated with a compressed air hose over the course of the entire weekend to purge any accumulated fumes from underneath the machine; (4) the washing machine door was left open Friday evening so that the interior of the machine could be aired out over the weekend; (5) and a special floor-level ventilation system was left running during the

weekend to help purge the room of fumes.

He smelled no solvent odors in the room. He suggested wrapping portions of the machine with fire retardant blankets and putting water in the bottom of a pit in which the washer sat, in order to prevent residual materials on the floor of the pit from catching fire. There was an apparent misunderstanding between Ellison and other gentlemen about whether an LEL ("Lower Explosive Limit") monitor had been used.

When Ellison was told by another employee of concerns about the possibility of fire during the welding, he and that employee returned to the parts washer room and discussed the precautions that had been taken. Ellison left the room for a period of time and was returning to it when the welding began and the explosion occurred. A spark from the welding torch ignited solvent vapors within the parts washer, blowing a steel door off the washer. The door struck the Petitioner's decedent. When the decedent was killed, he was standing in what was considered to be the safest position in the room.

At the time of the accident, Ellison was a Kentucky resident. On or before May 9, 1994 Ellison left Alusuisse's employ and became a citizen of Wisconsin, so there was complete diversity at the time this action was originally filed on May 12, 1994. A Summons was issued for Ellison on May 12, 1994 and on May 13, 1994 the Shelby County Sheriff made a return indicating that Ellison was no longer a Kentucky resident. On August 11, 1994 one of the attorneys for Alusuisse advised Petitioner's counsel of Ellison's new address and employment. However, Ellison was not served with Summons or pleadings until November 13, 1995. That was in part due to an Order issued by the District Court on

October 11, 1994 in Alusuisse's earlier removal effort and continued by Order dated March 21, 1995. (Appendix to this Brief, pages 1a and 3a, respectively.) However, Brierly never objected to the Order and made no further efforts to serve Ellison until November of 1995. No substantive steps occurred in Shelby Circuit Court, but considerable substantive discovery occurred in the federal action.

The District Court determined that Ellison properly removed the case and that Alusuisse could consent to that removal. Ultimately the District Court granted Ellison's Motion for Summary Judgment and the Sixth Circuit affirmed.

REASONS FOR DENYING THE PETITION

I. WHETHER THIS COURT SHOULD WASTE JUDICIAL RESOURCES BY REVIEWING THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS, WHERE THE LAW OF THE COMMONWEALTH OF KENTUCKY AND THE FACTS OF THIS CASE COMPELLED SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT ELLISON?

Even if the issues framed by Petitioner were worthy of consideration, this is not the case in which to review them. The Court stated in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 Sup.Ct. 467 (1996), at 477:

> To wipe out the adjudication post-judgment and return to state court a case now satisfying all federal jurisdictional requirements would

> impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

In this case, all federal jurisdictional requirements were met. No discovery was conducted in the State court case, while extensive discovery was conducted in the Federal action before the Summary Judgment was granted. The holdings of the courts below were well-founded and returning this case to Shelby Circuit Court would "impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."

The Petitioner would have the Court believe that the lower courts imposed upon him a burden of proof in a civil action greater than that required to support a criminal conviction, but the arguments about "inferred" intent have no relevance to Ellison. In fact, no cause of action was stated against Ellison, because there was no allegation of the single basis on which such a cause of action may be founded. There are two instances in which an injured employee may avoid the exclusive remedies of the Kentucky Workers' Compensation system and file a civil action for damages, neither of which provided the Petitioner any relief against Ellison.

A. *The Petitioner has no cause of action under the first exception to the Workers' Compensation laws.*

The first exception is found in KRS 342.610 (4), which provides:

> If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the

> employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons. (Emphasis added.)

Even if the decedent's injuries and death were considered to have resulted from the deliberate intention of Alusuisse (which Ellison denies), KRS 342.610 (4) grants the Petitioner a cause of action only against Alusuisse, not a fellow employee such as Ellison.

Under any rule of statutory construction, KRS 342.610 (4) must be construed as excluding Ellison from any potential liability to the Plaintiff. Under the rule of *ejusdem generis,* where general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by

the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated. *Woods v. Simpson*, 46 F.3d 21 (6th Cir. 1995); *Steinfeld v. Jefferson County Fiscal Court*, 312 Ky. 614, 229 S.W.2d 319 (1950). Here the use of the word "employer" does not admit the inclusion of the word "employee" into KRS 342.610 (4).

Likewise, under the maxim, *Expressio unius est exclusio alterius*, the express mention of one thing in a statute implies the exclusion of another different thing. *Steinfeld, supra*. The maxim applies where that which is expressed is in such great contrast to that which is omitted that the contrast enforces the affirmative inference that which is omitted must be intended to have opposite and contrary treatment. *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927); *Wade v. Commonwealth*, 303 S.W.2d 905 (Ky. 1957); *George v. Com.*, 885 S.W.2d 938 (Ky. 1994); *Louisville Water Co. v. Wells*, 664 S.W.2d 525 (Ky. 1984). The Kentucky legislature could have easily included the word "employee" in KRS 342.610 (4) but did not, whereas "employer" is mentioned multiple times.

Where there is no exception to the positive terms of a statute the presumption is that the legislature intended none. *Com. Ex Rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992); *Stone v. Kentucky Ins. Guar. Ass'n.*, 908 S.W.2d 675 (Ky. 1995). Where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. *Commonwealth of Ky. Ex Rel. Hancock v. Ruckelshaus*, 362 F.Supp. 360, Aff'd 497 F.2d 1172 (6th Cir. 1974), Aff'd 426 U.S. 167, 96 S.Ct. 2006, 48 L. Ed.2d 555 (1976).

In determining the meaning of legislation, the Court must first look to the plain language of the statute itself; if no ambiguity in the statutory language is found, that language is regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. *Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988). That same philosophy and approach applies to any Kentucky statute. In *Manning v. Kentucky Bd. of Dentistry*, 657 S.W.2d 584 (Ky. 1983), the court stated, at 587:

> The Court's function in the interpretation of statutes is to construe the language so as to give effect to the intent of the legislature. [citations omitted] Where words in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written. [citations omitted] It is presumed that the legislature is acquainted with the law on the subjects on which it legislates and is informed of previous legislation and construction that it has previously received. Where it has made no exception to the positive terms of the statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction. [citations omitted]

KRS 446.080 (4) provides:

> All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law,

shall be construed according to such meaning.

The word "employer" has a common and distinct meaning both in law and ordinary usage; an employer is an entity quite distinct from an employee. It must be presumed that the legislature meant to allow a civil cause of action, under the specified circumstances, only against employers. There are no ambiguities in the statute; KRS 342.610 (4) allows a cause of action at law only against an employer.

B. *The Petitioner stated no cause of action under the second exception to the Workers' Compensation laws and Ellison's right to Judgment was compelling.*

> KRS 342.690 (1) provides, in part:
> The exemption from liability given an employer by this section shall also extend to such employer's . . . employees . . . , provided the exemption from liability given an employee shall not apply in any case where the injury or death is proximately caused by the wilful and unprovoked physical aggression of such employee . . . . (emphasis added).

The Complaint stated no cause of action under KRS 342.690 (1) because there was no allegation that the decedent's injury or death was "proximately caused by the wilful and unprovoked physical aggression" of Ellison. The Complaint alleged that Ellison "knew immediately prior to the explosion that [his] intended course of action created a known unsafe and hazardous work environment which could or would result in serious bodily injury or death to . . . Paul Brierly, yet deliberately placed [Brierly] in a position of imminent peril." The Complaint alleged that Ellison "failed and refused to take even the minimum safety precautions

required by local, state and/or federal law, and took affirmative and intentional actions in violation of such laws, all of which caused and brought about the death of [Brierly]."

It was alleged that the death "resulted from the deliberate, wilful and unprovoked intention of . . . Ellison . . . to produce serious injury or death as contemplated by KRS 342.610 (4), and/or KRS 342.690 (1) such that the prosecution of this action is without the restrictions of KRS Chapter 342" and that Ellison's "intentional conduct was undertaken with a deliberate and flagrant indifference to the rights of [Brierly] and with a subjective awareness that such intentional conduct would result in bodily harm or death to [Brierly]."

If those allegations were an attempt to meet the "physical aggression" requirements of KRS 342.690 (1) it was a failed Procrustean effort. There was no physical aggression by Ellison and there is no allegation of such physical aggression.

The Kentucky legislature meant to remove the exclusivity protection from an employee who intentionally and physically attacks another employee without provocation. For example, in *Russell v. Able*, 931 S.W.2d 460 (Ky. 1996), Able approached Russell from behind and intentionally placed her knee to the back of Russell's knee, causing Russell to fall to the floor. Russell was allowed to sue Able, despite the fact that she had recovered compensation benefits. The case makes it apparent that "physical aggression" means exactly what it says; there is no exception for anything less.

Even if the allegations of the Complaint are stretched to encompass "physical aggression", Ellison was entitled to summary judgment because he never committed any act of

physical aggression. It is apparent that even if "deliberate intention" were a criterion applicable to Ellison, he committed no such act. *Fryman v. Electric Steam Radiator Corporation*, 277 S.W.2d 25 (Ky. 1955); *McCray v. Davis H. Elliott Co.*, 419 S.W.2d 542 (Ky. 1967). The record is clear that no Alusuisse employee ever contemplated the possibility of an explosion.

C. *No inference of intent operates against Ellison.*

The argument Petitioner makes at pages 25 et seq. of the Petition should be read carefully. There the Petitioner argues that the deliberate intention required by KRS 342.610 (4) may be inferred from circumstances. Whether this is true or not, KRS 342.610 (4) does not apply to employees such as Ellison, but only to employers. The Petitioner carefully fails to mention that distinction in his argument and it is a critical omission.

Moreover, Ellison's acts or inactions would not furnish the basis for such an inference in any event. In *Reddick v. Commonwealth*, 33 S.W. 416 (Ky. 1895), the Court held that a person who caused a hotel to burn, in which fire a person died, could be convicted of murder even though he might deny intent to have caused a death. The Court held, at 417, that this felony of arson:

> . . . clearly belonged to the cases "malum in se" and not merely "malum prohibitum."

In determining whether a fact finder may infer intent in a civil case, Kentucky focuses on the nature of the actions causing the injury. Is the crime malum in se? Is it a heinous act? Is it an act that is certain to cause a harm? Did the effort to perpetrate the act go beyond the casual? Kentucky

does not hold that deliberate intent to injure may be inferred in cases of ordinary claims of negligence. Do the facts of this case come anywhere near meeting the criteria for allowing an inference of intent? Not at all. As the District Court pointed out:

> Surely these gentlemen would have been out of the plant long before the welding started had they planned or even anticipated the possibility of an explosion.

Ellison was manifestly entitled to judgment, and to remand this case to State court would not only be an unwarranted burden on him, it would be a waste of judicial resources.

II. WHETHER THE RESPONDENT ELLISON SHOULD BE PREVENTED FROM HAVING ACCESS TO THE FEDERAL COURTS WHERE HE WAS NOT SERVED WITH PROCESS FOR 18 MONTHS AND HAD NOTHING TO DO WITH ANY PROCEDURAL MISSTEPS BY THE OTHER RESPONDENT.

A. The one year bar does not apply.

28 U.S.C. § 1446 (b) provides, in pertinent part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . .

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action.

This case was removable as originally filed and Ellison complied with the first paragraph of 28 U.S.C. § 1446(b). The second paragraph deals with cases not removable upon initial filing. It is important to note that the only reference to the one year bar is found within the second paragraph, so the modifying clause applies only to the second paragraph. If Congress intended the one year bar to apply to the entirety of 28 U.S.C. §1446(b), a third sub-paragraph could have easily been inserted, stating that the one year bar applied to all cases. Where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. *Commonwealth of Kentucky, Ex Rel. Hancock v. Ruckelshaus, supra.*

Caterpillar Inc. v. Lewis, supra, does not impose the one year bar on this case. The Petitioner claims that the Supreme Court's statement, that no case may be removed beyond one year, is a ruling by the Supreme Court that the one year bar applies to actions originally removable. That is not correct. *Caterpillar Inc. v. Lewis* was a case which was not originally removable and became removable only after the deletion of other defendants. Thus, the Supreme Court only had before it the question of the one year bar as it applied to

cases which later became removable; whether the one year bar applied to cases removable as originally filed was not a question necessary for resolution.

After the Shelby County Sheriff's return on May 12, 1994 the Petitioner never even attempted to serve Ellison until November of 1995, even though a Wisconsin address was known to the Petitioner's attorney in August of 1994. The Petitioner did not object to the Stay Order of October 11, 1994 or the Order of March 21, 1995 continuing the Stay Order. Moreover, the District Court's Memorandum Opinion and Order of March 30, 1995 (Appendix to Petition at page 83a) points out that the stay was on the merits and did not preclude the Court from rendering its opinion regarding jurisdictional issues; the issue of Ellison's citizenship was a jurisdictional issue, resolution of which was delayed by the Petitioner's failure to effect service until November of 1995.

Petitioner acknowledges that the Fifth and Ninth Circuits have also ruled that the one year limitation applies only to cases not initially removable. Even more significant is this Court's denial of certiorari in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), cert. denied 119 S.Ct 407 (1998). There the Petitioner framed one of his issues as follows:

> I. Does the one year limitation on diversity removal under the 1988 amendments to 28 U.S.C. § 1446 (b) absolutely preclude removal in *all* diversity cases after the limitation period expires, and if not, does the one year limitation period on removal only begin to run from the date when the action stated by the initial pleading setting forth the claim for relief filed in state court was served on the diverse state court defendant, who then filed notice of

> removal more than two years beyond the filing of the original action in state court? (Appendix to this Brief, page 9a)

Thus, the Court has already rejected a Petition to visit this issue, and Ellison respectfully submits that the Court should reject the instant petition.

B. *To construe Alusuisse's vigorous attempts at removal as a waiver would unfairly deprive Ellison of his rights under 28 USC § 1446 (b).*

The Petitioner's cited cases are distinguishable. For example, in *Scialo v. Scala Packing Co., Inc.*, 821 F.Supp. 1276 (N.D. Ill. 1993), the original attempts at removal were woefully inadequate, and a reading of the case makes it apparent that the original defendants attempted to justify their lack of proper removal with spurious reasoning, as detailed by the court at 1277, footnote 3.

In *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986) the original Defendants did not remove the case, but defended it in State court for about four years. Thereafter, new Defendants were named and they proceeded to remove the case; the original Defendants gave their consent to that removal. The Fifth Circuit merely decided that the original Defendants had waived their right to consent, precluding their later consent.

Petitioner misreads *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989). There the Plaintiffs sued Great Republic Insurance Company (GRIC) but the Complaint was answered by Great Republic Life Insurance Company (GRLIC), which even counterclaimed against Cantrell. There was no removal. The Plaintiff then filed an Amended

Complaint, specifically naming GRLIC as a Defendant. The Ninth Circuit held that the original failure to remove was a waiver because GRLIC was acting as a party long before the technical amendment of the Complaint.

In this case, it can hardly be said that Alusuisse waived its right to remove; it may have made procedural missteps, but its actions were all in the course of a vigorous attempt to remove the case.

C. *The Sixth Circuit properly decided that a later served Defendant has 30 days from service in which to remove a case to federal district court.*

Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254 (5th Cir. 1988) did in fact apply a rule of unanimity. However, even that case must be viewed in the context of its facts. There Getty sued three defendants, serving them on September 3rd, September 5th and September 24th, 1986 respectively. The first served Defendant removed timely, with the second served Defendant consenting. The third served Defendant consented, but beyond thirty days from service on the first served Defendant. The court held that all served Defendants must join in the Petition no later than thirty days from service on the first Defendant. Of course, *Getty Oil* deals with a situation in which all of the named Defendants were served within a relatively close time period. *Getty Oil* was criticized in *McKinney v. Board of Trustees of Mayland Com. Coll.*, 955 F.2d 924 (4th Cir. 1992).

The *McKinney* court pointed out that §1446 (b) does not address the issue of multiple defendants and does not say that the time will run from service on the "first served" defendant. The court rejected *Getty Oil* by saying it was not

logical and promoted inequity, not unanimity. To the argument that a Plaintiff should know at the earliest possible date what court he will be in, the court answered that the Plaintiff should get all of the Defendants served at about the same time. Moreover, the court rejected the notion that choosing the forum was "bad" or a "defeat" of the Plaintiff's choice of forum. The court did not believe that Congress meant a Plaintiff's right to choose a forum was of any greater value than a Defendant's right to remove.

Weimer v. City of Johnstown, NY, 931 F.Supp.985 (N.D. NY 1996) points out many reasons why the last served rule was not applied in that particular case. Even in *Weimer*, however, the Court specifically stated, at 993, that "...the Court does not wish to close the door to this line of argument in future cases displaying the characteristics...warranting application of the minority, last-served rule."

The Sixth Circuit was correct. Ellison and Alusuisse have separate counsel. Petitioner's counsel was aware of Ellison's Wisconsin address in August of 1994 but made no effort to serve him for eighteen months. Removals to federal district court are subject to Rule 11 of the federal rules of civil procedure and a later served defendant should be given time to properly analyze the Complaint. 28 U.S.C. § 1446 (b) does not adequately deal with the issue of multiple defendants and it never makes reference to a "first served" defendant. The Sixth Circuit properly decided that to refuse Ellison a right of removal granted him by Congress would be inequitable. The Petitioner's parade of horribles should not persuade this court. The Sixth Circuit has not created a situation where parties wishing to be in state court will be subjected to frequent journeys to federal court and back and the Sixth Circuit certainly did not shift to a Plaintiff the burden of proving nondiversity.

CONCLUSION

There are no compelling reasons why certiorari should be granted in this case. The law and the facts in favor of Ellison are so compelling that it would be a waste of judicial resources for this Court to grant certiorari.

For those reasons, Ellison respectfully submits that the Court should deny the Petition for Writ of Certiorari now pending before this Court.

Respectfully submitted this 17th day of November, 1999.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed October 11, 1994]

CIVIL ACTION NO. 94-55

JEFFREY D. BRIERLY, Administrator
of the Estate of Paul Brierly, deceased
PLAINTIFF,

v. **ORDER**

ALUSUISSE FLEXIBLE PACKAGING, INC.,

and

DAVID ELLISON,
DEFENDANTS.

* * * * * * * *

This matter is before the Court upon the motion of the defendant, Alusuisse Flexible Packaging, Inc. [Alusuisse] to stay further proceedings in this action until the resolution of separate actions stemming from the explosion in question including: pending action before Kentucky Workers' Compensation Board; the pendency of criminal charges

against Alusuisse; and the pendency of three separate actions against Alusuisse other than the instant action. [Record No. 4]. The plaintiff has failed to respond.

Having considered the record and being otherwise advised,

IT IS HEREBY ORDERED:

(1) That the motion of the defendant to stay further proceedings [Record No. 4] be, and the same hereby is, GRANTED.

(2) That all further proceedings in this matter SHALL BE STAYED pending further Orders from this Court.

(3) That the parties shall file a joint status report within the earlier of 120 days from the date of entry of this Order or when the case proceeding before the Kentucky Workers' Compensation Board has been resolved.

This the 4th day of October, 1994.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed March 21, 1995]

CIVIL ACTION NO. 94-55

JEFFREY D. BRIERLY, Administrator of
the Estate of Paul Brierly, deceased,
PLAINTIFF,

v. **ORDER**

ALUSUISSE FLEXIBLE PACKAGING,
INC.,
DEFENDANT.

The Court having considered the parties' status reports [Record Nos. 11 & 12], and being duly advised, accordingly,

IT IS ORDERED that the STAY in the above-captioned matter entered by this Court on October 11, 1995, shall continue in full force and effect pending further orders.

IT IS FURTHER ORDERED that the parties file a joint status report within the earlier of 180 days from the date of entry of this Order or when the case proceeding before the

Kentucky Workers' Compensation Board has been resolved.

This the 21st day of March, 1995.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

APPENDIX C

KRS 342.690 (1)

KRS 342.690 EXCLUSIVENESS OF LIABILITY

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or

carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

APPENDIX D

KRS 446.080 (4)

KRS 446.080LIBERAL CONSTRUCTION; STATUTESNOT RETROACTIVE; COMMON USAGE; TECHNICAL TERMS

* * *

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

APPENDIX E

No._____
In The
Supreme Court of the United States
October Term, 1997

JOE B. RITCHEY,

Petitioner,

v.

UPJOHN COMPANY and WILLIAM DEMENT,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL D. MOSHER
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QUESTIONS PRESENTED FOR REVIEW

1. Does the one year limitation on diversity removal under the 1988 amendments to 28 U.S.C. § 1446(b) absolutely preclude removal in *all* diversity cases after the limitation period expires, and if not, does the one year limitation period on removal only begin to run from the date when the action stated by the initial pleading setting forth the claim for relief filed in state court was served on the diverse state court defendant, who then filed notice of removal more than two years beyond the filing of the original action in state court?

2. Does removal of a case by a diverse defendant under 28 U.S.C. § 1446(b) on grounds of fraudulent joinder based on the bald and frivolous claim that plaintiff could not possibly prevail in state court under state law against non-diverse defendants, unconstitutionally vet the judicial power in the United States courts beyond Article III, Section 2 of the United States Constitution when any alleged pleading deficiencies could have been readily cured by amendment to the original state court complaint which had not even once yet been amended in state court?

3. Is a diversity case removable under 28 U.S.C. §1446(b) on grounds of alleged fraudulent joinder of nondiverse parties where the district court found, in the absence of any discovery and in the face of comprehensive and detailed countervailing declaration, that the pro se plaintiff could not possible prevail against a statute of limitations and res judicata defense for state law common law fraudulent concealment, deceit and conspiracy by a pharmaceutical manufacturer and its so-called independent FDA

advisors who allegedly, for payments from Upjohn of more than $2,000,000 per year, concealed research from and misled the Food and Drug Administration to prevent the timely discovery of the cause of injury and cause of action by the petitioner - even though the offered new and independent State resident actions tolled the statutes of limitations under California law and the state law conspiracy was only discovered by the plaintiff less than 6 months before the filing of this action in state court.